

## Union Calendar No. 26

111<sup>TH</sup> CONGRESS  
1<sup>ST</sup> SESSION

# H. R. 985

**[Report No. 111–61]**

To maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media.

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### IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 11, 2009

Mr. BOUCHER (for himself, Mr. PENCE, Mr. CONYERS, Mr. GOODLATTE, Mr. YARMUTH, Mr. WALDEN, Ms. ZOE LOFGREN of California, Mr. COBLE, Mr. WEXLER, Mr. BLUNT, Ms. BERKLEY, Mr. WU, Ms. SCHAKOWSKY, Ms. LEE of California, Mr. DELAHUNT, Mr. MACK, Mr. MCCAUL, Ms. NORTON, Mr. WOLF, Ms. WOOLSEY, Mr. MURPHY of Connecticut, Mr. UPTON, Ms. SLAUGHTER, Mr. BERRY, Ms. GIFFORDS, Mr. GONZALEZ, Mr. PUTNAM, Mr. WEINER, Mr. PAYNE, Mr. COHEN, Mr. KENNEDY, Mr. RADANOVICH, Mr. COOPER, Mr. DOYLE, Ms. BALDWIN, Ms. WASSERMAN SCHULTZ, Ms. ESHOO, Mr. BUTTERFIELD, and Mr. REHBERG) introduced the following bill; which was referred to the Committee on the Judiciary

MARCH 30, 2009

Additional sponsors: Mr. McDERMOTT, Mr. CLAY, Mr. BRADY of Texas, Ms. EDDIE BERNICE JOHNSON of Texas, Mr. KIND, Mr. OBERSTAR, Mr. LEE of New York, Mr. ROONEY, Ms. JACKSON-LEE of Texas, Mr. POE of Texas, Mr. BOOZMAN, and Mr. MAFFEI

MARCH 30, 2009

Committed to the Committee of the Whole House on the State of the Union  
and ordered to be printed

# A BILL

To maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

## 3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Free Flow of Informa-  
5 tion Act of 2009”.

## 6 **SEC. 2. COMPELLED DISCLOSURE FROM COVERED PER-** 7 **SONS.**

8 (a) CONDITIONS FOR COMPELLED DISCLOSURE.—In  
9 any matter arising under Federal law, a Federal entity  
10 may not compel a covered person to provide testimony or  
11 produce any document related to information obtained or  
12 created by such covered person as part of engaging in  
13 journalism, unless a court determines by a preponderance  
14 of the evidence, after providing notice and an opportunity  
15 to be heard to such covered person—

16 (1) that the party seeking to compel production  
17 of such testimony or document has exhausted all  
18 reasonable alternative sources (other than the cov-  
19 ered person) of the testimony or document;

20 (2) that—

1 (A) in a criminal investigation or prosecu-  
2 tion, based on information obtained from a per-  
3 son other than the covered person—

4 (i) there are reasonable grounds to be-  
5 lieve that a crime has occurred; and

6 (ii) the testimony or document sought  
7 is critical to the investigation or prosecu-  
8 tion or to the defense against the prosecu-  
9 tion; or

10 (B) in a matter other than a criminal in-  
11 vestigation or prosecution, based on information  
12 obtained from a person other than the covered  
13 person, the testimony or document sought is  
14 critical to the successful completion of the mat-  
15 ter;

16 (3) in the case that the testimony or document  
17 sought could reveal the identity of a source of infor-  
18 mation or include any information that could reason-  
19 ably be expected to lead to the discovery of the iden-  
20 tity of such a source, that—

21 (A) disclosure of the identity of such a  
22 source is necessary to prevent, or to identify  
23 any perpetrator of, an act of terrorism against  
24 the United States or its allies or other signifi-

1 cant and specified harm to national security  
2 with the objective to prevent such harm;

3 (B) disclosure of the identity of such a  
4 source is necessary to prevent imminent death  
5 or significant bodily harm with the objective to  
6 prevent such death or harm, respectively;

7 (C) disclosure of the identity of such a  
8 source is necessary to identify a person who has  
9 disclosed—

10 (i) a trade secret, actionable under  
11 section 1831 or 1832 of title 18, United  
12 States Code;

13 (ii) individually identifiable health in-  
14 formation, as such term is defined in sec-  
15 tion 1171(6) of the Social Security Act (42  
16 U.S.C. 1320d(6)), actionable under Fed-  
17 eral law; or

18 (iii) nonpublic personal information,  
19 as such term is defined in section 509(4)  
20 of the Gramm-Leach-Bliley Act (15 U.S.C.  
21 6809(4)), of any consumer actionable  
22 under Federal law; or

23 (D)(i) disclosure of the identity of such a  
24 source is essential to identify in a criminal in-  
25 vestigation or prosecution a person who without

1 authorization disclosed properly classified infor-  
2 mation and who at the time of such disclosure  
3 had authorized access to such information; and

4 (ii) such unauthorized disclosure has  
5 caused or will cause significant and articulable  
6 harm to the national security; and

7 (4) that the public interest in compelling disclo-  
8 sure of the information or document involved out-  
9 weighs the public interest in gathering or dissemi-  
10 nating news or information.

11 (b) AUTHORITY TO CONSIDER NATIONAL SECURITY  
12 INTEREST.—For purposes of making a determination  
13 under subsection (a)(4), a court may consider the extent  
14 of any harm to national security.

15 (c) LIMITATIONS ON CONTENT OF INFORMATION.—  
16 The content of any testimony or document that is com-  
17 pelled under subsection (a) shall—

18 (1) not be overbroad, unreasonable, or oppres-  
19 sive and, as appropriate, be limited to the purpose  
20 of verifying published information or describing any  
21 surrounding circumstances relevant to the accuracy  
22 of such published information; and

23 (2) be narrowly tailored in subject matter and  
24 period of time covered so as to avoid compelling pro-

1       duction of peripheral, nonessential, or speculative in-  
2       formation.

3       (d) RULE OF CONSTRUCTION.—Nothing in this Act  
4       shall be construed as applying to civil defamation, slander,  
5       or libel claims or defenses under State law, regardless of  
6       whether or not such claims or defenses, respectively, are  
7       raised in a State or Federal court.

8       (e) EXCEPTION RELATING TO CRIMINAL OR  
9       TORTIOUS CONDUCT.—The provisions of this section shall  
10      not prohibit or otherwise limit a Federal entity in any  
11      matter arising under Federal law from compelling a cov-  
12      ered person to disclose any information, record, document,  
13      or item obtained as the result of the eyewitness observa-  
14      tion by the covered person of alleged criminal conduct or  
15      as the result of the commission of alleged criminal or  
16      tortious conduct by the covered person, including any  
17      physical evidence or visual or audio recording of the con-  
18      duct, if a Federal court determines that the party seeking  
19      to compel such disclosure has exhausted all other reason-  
20      able efforts to obtain the information, record, document,  
21      or item, respectively, from alternative sources. The pre-  
22      vious sentence shall not apply, and subsections (a) and  
23      (b) shall apply, in the case that the alleged criminal con-  
24      duct observed by the covered person or the alleged crimi-  
25      nal or tortious conduct committed by the covered person

1 is the act of transmitting or communicating the informa-  
2 tion, record, document, or item sought for disclosure.

3 **SEC. 3. COMPELLED DISCLOSURE FROM COMMUNICATIONS**  
4 **SERVICE PROVIDERS.**

5 (a) CONDITIONS FOR COMPELLED DISCLOSURE.—  
6 With respect to testimony or any document consisting of  
7 any record, information, or other communication that re-  
8 lates to a business transaction between a communications  
9 service provider and a covered person, section 2 shall apply  
10 to such testimony or document if sought from the commu-  
11 nications service provider in the same manner that such  
12 section applies to any testimony or document sought from  
13 a covered person.

14 (b) NOTICE AND OPPORTUNITY PROVIDED TO COV-  
15 ERED PERSONS.—A court may compel the testimony or  
16 disclosure of a document under this section only after the  
17 party seeking such a document provides the covered per-  
18 son who is a party to the business transaction described  
19 in subsection (a)—

20 (1) notice of the subpoena or other compulsory  
21 request for such testimony or disclosure from the  
22 communications service provider not later than the  
23 time at which such subpoena or request is issued to  
24 the communications service provider; and

1           (2) an opportunity to be heard before the court  
2       before the time at which the testimony or disclosure  
3       is compelled.

4       (c) EXCEPTION TO NOTICE REQUIREMENT.—Notice  
5       under subsection (b)(1) may be delayed only if the court  
6       involved determines by clear and convincing evidence that  
7       such notice would pose a substantial threat to the integrity  
8       of a criminal investigation.

9       **SEC. 4. DEFINITIONS.**

10       In this Act:

11           (1) COMMUNICATIONS SERVICE PROVIDER.—

12       The term “communications service provider”—

13           (A) means any person that transmits infor-  
14       mation of the customer’s choosing by electronic  
15       means; and

16           (B) includes a telecommunications carrier,  
17       an information service provider, an interactive  
18       computer service provider, and an information  
19       content provider (as such terms are defined in  
20       sections 3 and 230 of the Communications Act  
21       of 1934 (47 U.S.C. 153, 230)).

22           (2) COVERED PERSON.—The term “covered  
23       person” means a person who regularly gathers, pre-  
24       pares, collects, photographs, records, writes, edits,  
25       reports, or publishes news or information that con-



cerns local, national, or international events or other matters of public interest for dissemination to the public for a substantial portion of the person's livelihood or for substantial financial gain and includes a supervisor, employer, parent, subsidiary, or affiliate of such covered person. Such term shall not include—

(A) any person who is a foreign power or an agent of a foreign power, as such terms are defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801);

(B) any organization designated by the Secretary of State as a foreign terrorist organization in accordance with section 219 of the Immigration and Nationality Act (8 U.S.C. 1189);

(C) any person included on the Annex to Executive Order No. 13224, of September 23, 2001, and any other person identified under section 1 of that Executive order whose property and interests in property are blocked by that section;

(D) any person who is a specially designated terrorist, as that term is defined in sec-

1           tion 595.311 of title 31, Code of Federal Regu-  
2           lations (or any successor thereto); or

3           (E) any terrorist organization, as that  
4           term is defined in section 212(a)(3)(B)(vi)(II)  
5           of the Immigration and Nationality Act (8  
6           U.S.C. 1182(a)(3)(B)(vi)(II)).

7           (3) DOCUMENT.—The term “document” means  
8           writings, recordings, and photographs, as those  
9           terms are defined by Federal Rule of Evidence 1001  
10          (28 U.S.C. App.).

11          (4) FEDERAL ENTITY.—The term “Federal en-  
12          tity” means an entity or employee of the judicial or  
13          executive branch or an administrative agency of the  
14          Federal Government with the power to issue a sub-  
15          poena or issue other compulsory process.

16          (5) JOURNALISM.—The term “journalism”  
17          means the gathering, preparing, collecting,  
18          photographing, recording, writing, editing, reporting,  
19          or publishing of news or information that concerns  
20          local, national, or international events or other mat-  
21          ters of public interest for dissemination to the pub-  
22          lic.



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